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Supreme Court of the United States

OCTOBER TERM, A. D., 1948

No. 113

BATH MILLS, INC., PETITIONER,

versus

THEODORE ODOM, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

1.

THE OPINIONS OF THE COURTS BELOW

The opinion of the District Court of the United States for the Eastern District of South Carolina was rendered September 18th, 1947, and is printed in full in the Record (pp. 28-31). The opinion of the United States Circuit Court of Appeals, Fourth Circuit, is dated April 29th, 1948, and is printed in full in the Record (pp. 18-21.)

2.

JURISDICTION

The appellant seeks to invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code (28 U. S. C. A. 347) and contends that under the provisions of Rule 38 of the Rules of the United States Supreme Court a writ of Certiorari should be granted to review the decisions of the United States Circuit Court of Appeals, Fourth Circuit.

We respectfully submit that the jurisdiction of this Court should not be invoked for the reasons hereinafter urged.

3.

STATEMENT OF CASE

This action was instituted by the respondent (plaintiff below) in the Court of Common Pleas for Aiken County to recover damages against the defendant for injuries sustained by the plaintiff arising out of and in the course of his employment, and the case was thereafter removed by the defendant to the United States District Court for the Eastern District of South Carolina. Although the original complaint filed in this action was predicated on the negligence, carelessness, gross negligence, willfullness and wantonness of the defendant, by the amended complaint the action is based solely on the negligence of the defendant, (R. pp. 3-7).

The amended complaint alleges that the defendant and plaintiff are employer and employee, respectively, under the provisions of the South Carolina Workmen's Compensation Act, and would be bound by such provisions relating to payment and compensation for personal injury or death by accident arising out of and in the course of employment

except for the notice of non acceptance of the provisions of the Act given by the defendant at least thirty days prior to the date of the alleged injury in accordance with the provisions of the said act, (R. pp. 25-26).

The defendant filed its answer to the said complaint alleging as a second defense thereof that the plaintiff was guilty of contributory recklessness and wantonness which proximately caused the plaintiff's injury.

The plaintiff thereafter seasonably moved to strike the defense of contributory recklessness and wantonness from the answer on the ground that contributory recklessness and wantonness is a degree of contributory negligence and therefore such defense is not available as a defense to the defendant in the instant action in accordance with the provision of section 7035-17, Code of Laws of South Carolina, 1942, the pertinent portion of which provides that "an employer who elects not to operate under this article shall not in any suit at law instituted by an employee subject to this article to recover damages for personal injury or death by accident, be permitted to defend any such suit at law upon any or all of the following grounds,

(a) That the employee was negligent."

The motion was resisted by the defendant and after a full hearing the District Court Judge granted the motion, (R. pp. 10-13).

The case was thereafter tried and the jury rendered a verdict in favor of the plaintiff for $5,000.00, and judgment was duly entered thereupon. The defendant appealed to the Circuit Court of Appeals for the Fourth Circuit from the judgment of the District Court on the sole ground that the District Judge was in error in granting the plaintiff's motion to strike the defense of contributory recklessness

and wantonness attempted to be set up in the defendant's answer.

The Circuit Court of Appeals affirmed the District Court and dismissed the appeal, (R. pp. 18-21).

QUESTIONS INVOLVED

The questions presented to this Court by the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit are as follows:

A.

Did the Circuit Court of Appeals decide an important question of local law in a way probably in conflict with applicable local decisions?

B.

Did the Circuit Court of Appeals fail to decide a federal question which has not been, but should be, settled by the United States Supreme Court?

C.

Did the Circuit Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

D.

Did the Petitioner comply with Paragraph 1 of Rule 12 of the rules of this Court in presenting the petition for a writ of certiorari?

ARGUMENT

Point A

The decision of the Circuit Court of Appeals does not involve an important question of local law, nor has the Court decided the question in a way probably in conflict with local applicable decisions.

It is well settled that unless a question of gravity and importance is herein involved this Court will not require a case to be certified for review and determination. *Ex parte Woods,* 143 U. S. 202; Rule 38, Paragraph 5, of Rules of the Supreme Court of the United States; nor will this Court assume jurisdiction merely to give the defeated party in the Circuit Court of Appeals another hearing, *Magnum Import Co. v. Houbigant, Inc.* 262 U. S. 159.

We respectfully submit that the interpretation of the statute of South Carolina, Section 7035-17, Code of Laws of South Carolina for 1942 (R. pp. 28-29), by the District Court and the Circuit Court of Appeals holding that the defendant may not be permitted to defend the instant suit at law upon the ground that the employee (respondent herein) was guilty of contributory recklessness and wantonness, does not fall within the category of questions of such gravity and general importance as to require the review of the conclusion of the Circuit Court of Appeals in reference to it.

Of course the question decided by the Court is important to the petitioner himself and involves cases wherein an employer elects not to operate under the Workmen's Compensation Act of South Carolina, but nevertheless the question was decided by the District Court and the Circuit Court of Appeals in accordance with the wording and intention of the Legislature and does not rise to that degree of importance wherein this Court should certify the question for review. Although the petitioner has the burden of proving the jurisdiction of this Court to grant certiorari it is noted that the petitioner has failed to point out either in its petition or the supporting brief how or in what manner the question decided by the Circuit Court of Appeals is an important one of local law.

Conceding, however, for the purpose of argument, that the question decided by the Circuit Court of Appeals may be an important one of local law, it is clear from the decisions of the District Court and the Circuit Court of Appeals that the question was decided in accordance with applicable local decisions. Thus, in the case of *Thornhill v. Davis,* 121 S. C. 49, decided by the Supreme Court of South Carolina, a very analogous situation to that of the instant case is presented. In that case the plaintiff brought an action against the defendant under the Federal Employers' Act under which contributory negligence is not a bar to the plaintiff's cause of action but could be set up by the defendant to the extent only of minimizing damages. The defendant in that case, like the petitioner in the instant case in the District Court below, sought to set up the plea of contributory recklessness or willfullness as a complete defense under the Federal Employers' Act, the defendant's position being that while the defense of contributory negligence merely operated in mitigation of damages, the defense of contributory recklessness or willfullness operates as a bar to the action. The Supreme Court of South Carolina in treating contributory recklessness and willfullness as a degree of contributory negligence and therefore holding that contributory recklessness or willfullness does not bar recovery, but operates to the same extent as contributory negligence, stated as follows:

> "Contributory negligence as a defense is applicable to an action under the federal statute to the extent, but to the extent only, of operating to minimize the damages in case the jury should find that the injured party was guilty of contributory negligence in the particulars alleged in the answer. The appellant contends that this rule does not apply in the present case, for the reason that the testimony established, not merely **contributory negligence** on the part of the plain-

tiff's intestate, but established **contributory recklessness and willfullness.** * * *" (Emphasis added.)

"The assignments of error under the seventh, eighth, thirteenth, and seventeenth assignments are * * * that the trial judge erred in failing to charge the jury that the plea of 'contributory recklessness or willfullness' was a complete defense under the Federal Employers' Liability Act—that is to say, that while the defense of contributory negligence merely operates in mitigation of damages, on the other hand contributory recklessness or willfullness operates as a bar to the action when established by competent testimony."

In dealing with such contention of the defendant the opinion continues:

"While it is not essential to our conclusion upon the exceptions raised relating to this matter, it may be remarked that Congress in limiting the force and effect of contributory negligence in an action of this character had in mind the changing of the application of the rule of evidence in such cases. Instead of such evidence operating to defeat the right of action entirely, after the passage of the act, in cases brought under the act, such evidence operates only to reduction of the damages which the plaintiff would otherwise, in the absence of such contributing cause, be entitled to receive. Under this rule of law, **the matter of contributory negligence and the degree thereof, if any, becomes one for the jury to consider in determining the amount of damages which should be awarded in case it should be found that any damages were recoverable.** (Emphasis added.) The reduction in amount then would vary with the **degree of negligence** operating as a contributing proximate cause to the injury by the injured party—if slight, the jury would be warranted in making a slight reduction in the amount which it would have otherwise awarded; if great, it would be warranted in making an entirely different estimate of the amount to which the damages should be reduced. The allega-

> tions of the **degrees of negligence** and the proof thereof are matters then to be considered by the jury in reaching its conclusion as to the amount to be awarded after having concluded that a case of liability has been established." (Emphasis added.)

In the case at bar the facts although not identical are very similar and analogous to the facts in the above-cited case; the only difference being that under the Federal Employers' Act contributory negligence is a defense only to the extent of minimizing plaintiff's damage, whereas, under the South Carolina Workmen's Compensation Act contributory negligence is not a defense to any extent. Since the South Carolina Supreme Court in the *Thornhill case* treated contributory recklessness and willfullness in the same manner as contributory negligence the decision of the Circuit Court of Appeals logically and reasonably followed in accordance with the reasoning of the *Thornhill case* that a different meaning should not be given to contributory recklessness or wantonness under the South Carolina Workmen's Compensation Act in the case *sub judice*, and that contributory recklessness and wantonness is a degree of contributory negligence and should not therefore be permitted as a defense to the plaintiff's cause of action.

The decision of the Circuit Court of Appeals is also supported by the case of *Templeton v. Charleston & W. C. Ry. Co.*, 117 S. C. 44. Dealing with the question of gross negligence as applied to the Employers' Liability Act, the South Carolina Supreme Court said therein:

> "The second objection to the charge is alleged error in stating that the plaintiff would be entitled to recover although his negligence was gross, and that of the defendant slight. We find nothing in the act, and the appellant has cited no authority, which would indicate error in this proposition. While the statute makes **no distinction between degrees of negligence** it

certainly does not debar plaintiff from all recovery in case his contributory negligence should be gross, and it certainly contemplates the possibility of the negligence of one being greater than that of the other." (Emphasis added.)

Under Section 7035-17, Code of Laws of South Carolina for 1942, the defendant, in an action by plaintiff, both of whom are employer and employee within the meaning of the Act, is not permitted to allege as a defense that the defendant was contributorily negligent in cases where a defendant does not elect to operate under the said Act. It follows, therefore, that since the defendant cannot allege contributory negligence he should not be permitted to allege any of the degrees thereof such as contributory recklessness or wantonness, otherwise the provisions of Section 7035-17 of the South Carolina Workmen's Compensation Act would be circumvented.

To permit the defendant to allege contributory recklessness or contributory wantonness would in effect be permitting him to allege that the plaintiff was contributorily negligent which is a degree of negligence and which must necessarily include contributory negligence. It is apparent that this would be contrary to the clear intent of the provision of the South Carolina Workmen's Compensation Act.

Petitioner contends that there is a marked difference between contributory negligence and contributory recklessness and wantonness, and in support of its contention cites in the petition a number of cases decided by the South Carolina Supreme Court and in its brief quotes a number of excerpts of such cases. As stated by the South Carolina Supreme Court in the case of *City of Anderson v. Fant*, 96 S. C. 5, "The language of an opinion must always be read and construed in the light of the facts of the case

under consideration," and when so read it will clearly appear that the quoted excerpts do not bear the interpretation placed upon them by petitioner. We have carefully examined the cases cited in the brief by petitioner and it will be noted that these cases deal generally with the question of punitive damages which under the law of South Carolina are allowable in a negligence case where a defendant is guilty of negligence so gross or reckless of consequences as to imply or assume the nature of wantonness, willfullness or recklessness. We agree that there may be some difference between negligence, recklessness and wantonness, but the difference is only in degree and not in kind. Our contention on this point is clearly supported by the language of the then Chief Justice of the South Carolina Supreme Court in the case of *Bell v. Atlantic Coast Line Railroad Company*, 202 S. C. 160, wherein he states as follows:

> "In the case of *Sample v. Gulf Refining Co.*, 183 S. C. 399, 191 S. C. 209, this Court said on page 411 of the State Reports 183 S. C., 191 S. E., on page 214: 'While punitive damages are recoverable for **negligence so gross or reckless of consequences as to imply or to assume the nature of wantonness, willfullness, or recklessness,** yet they are not awarded in this state for mere gross negligence. *Watts v. South Bound R. Co.*, 60 S. C., 67, 38 S. E., 240; *Proctor v. Southern Ry Co.*, 61 S. C., 170, 39 S. E. 351; *Boyd v. Blue Ridge R. Co.*, 65 S. C., 326, 43 S. E., 817; *Webb v. Atlantic Coast Line R. Co.*, 76 S. C., 193, 56 S. E., 954, 9 L. R. A. S., 1218, 11 Ann. Cas., 834'." (Emphasis added.)

Also in the case of *Baxley v. Atlantic Coast Line R. Co.*, 193 S. C., 429, wherein it was held that contributory gross negligence is a defense to an action based on gross negligence, recklessness and wantonness, the following language of the court makes it apparent that recklessness and wantonness is nothing more than a degree of negligence:

"The failure to do so amounts to negligence and contributory negligence of such gross nature as to bar recovery."

In the case of *Cook v. Atlantic Coast Line R. Co.*, 183 S. C., 279, it was held that exemplary damages which must be based upon recklessness or wantonness "do not and cannot exist as an independent cause of action, but such damages are mere incidents to the cause of action and can never constitute the basis thereof. If the injured person has no cause of action independent of a supposed right to recover exemplary damages, then he has no cause of action at all." Thus it clearly appears that where negligence, recklessness and wantonness are alleged they are not two independent causes of action.

As stated by the Circuit Court of Appeals "there is nothing" in the cases cited by the petitioner "to justify a holding that reckless and wanton conduct does not fall within the negligence of the employee which the statute forbids the employer to assert as a defense, where the clear purpose of the statute is to make the negligence of the (fols. 22-23), employer the sole test of his liability." The Circuit Court of Appeals also predicated its decision on the case of *Tiller v. A. C. L. R. Co.*, 318 U. S., 54, 58, decided by this Court. The plaintiff in that case brought an action under the Federal Employers' Liability Act to recover damages for the death of plaintiff's intestate, an employee of the defendant, by reason of the negligent operation of a car and failure of the defendant to provide a reasonably safe place to work. The defendant denied negligence on its part and pleaded contributory negligence on the part of the plaintiff's intestate, and also set up as a separate defense the assumption of risk. The United States Supreme Court in holding that an employee under the Employers' Liability Act cannot be charged with the assumption of risk under another name had this to say:

"We find it unnecessary to consider whether there is any merit in such a conceptual distinction between aspects of assumption of risk which seem functionally so identical, and hence we need not pause over the cases cited by the court below, all decided before the 1938 amendment, which treat assumption of risk sometimes as a defense to negligence, sometimes as the equivalent of non-negligence. We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'. As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Act of (March 2), 1893, 45 U. S. C. A., Sec. 1, 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name;' and no such result can be permitted here."

As was so aptly stated by the Honorable George Bell Timmerman, United States District Judge, in granting the plaintiff's motion to strike the defense in question:

"The reasoning of the Supreme Court in the *Tiller case* is applicable here. An employer should not be permitted to circumvent the General Assembly's clear intention to abolish the defense of contributory negligence in cases of this character by merely calling a defense contributory recklessness or contributory wantonness and thereby retain the advantages of practically all the testimony that might be introduced in a common-law action based on negligence where the plea of contributory negligence is interposed."

The decisions of the South Carolina Supreme Court in dealing with the philosophy of the Workmen's Compensation Act and the interpretation of same have repeatedly held that the Act should be construed favorably in favor

of employees and their dependents in furtherance of the beneficent purpose for which it was enacted and to avoid incongruous or harsh results. Following the reasoning of this principle of law to its logical conclusion makes it clear that if the defendant in the instant case were permitted to set up the defense of contributory recklessness and wantonness it would be opening the door to the introduction of the defense of contributory negligence, contrary to the clear intent and purpose of our legislature in enacting the provisions of Section 7035-17 of the Code of Laws of South Carolina, 1942, which would lead to harsh and incongruous results. On this point the South Carolina Supreme Court in the case of *Cokely v. Robert Lee, Inc.*, 197 S. C., 159, had this to say:

> "Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue and obtain compensation is taken away, and such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted, and to avoid any incongruous or harsh results. *Phillips v. Dixie Stores, Supra; Rudd v. Fairforest Finishing Company, supra; Layton v. Hammond-Brown-Jennings Company, supra; Bannister v. Shepherd, supra; Ham v. Mullins Lumber Company, supra; Marchbanks v. Duke Power Company*, 190 S. C., 336, 2 S. E., (2d), 825; *Patterson v. Courtenay Mfg. Company*, S. C. 14 S. E. (2d), 16, decided April 2, 1941."

It further appears from an examination of the decision of the Circuit Court of Appeals that the facts upon

which the petitioner relied, as indicated by the pleadings and statements at the bar of the Circuit Court clarifying the stipulation, amounted to nothing more than contributory negligence, the nature of which was not changed by calling it contributory recklessness and wantonness. It also appeared to the satisfaction of the Circuit Court of Appeals that if there was any error as a result of the ruling of the District Court the petitioner did not suffer prejudice as the result of such ruling.

For the reasons aforementioned under this heading we respectfully submit that the petition for the writ of certiorari to the Circuit Court of Appeals should be denied.

Point B

The Circuit Court of Appeals did not fail to decide a federal question which should be settled by the United States Supreme Court.

Although petitioner attempts to raise the federal question that the construction of the aforementioned provision of the South Carolina Statute constitutes a taking of petitioner's property without due process of law in violation of the United States Constitution, we respectfully submit that the constitutional point is a mere pretext put forward in order to open other questions that otherwise would not come here. This pretext should not be allowed to succeed. We respectfully contend that this Court should not deal with an attempt by petitioner to obtain a reversal of the decision of the Circuit Court upon a construction of the South Carolina Statute, not so manifestly absurd as to include the defense of contributory recklessness and wantonness where the statute makes no distinction between degrees or kinds of negligence. The case of *United Surety Company v. American Fruit Products Company*, 238 U. S., 140, is precisely

in point and conclusive against the jurisdiction with reference to petitioner's contention.

We also submit that an alleged erroneous construction of a State statute by the State Court is binding upon the United States Supreme Court, *Greenough v. Tax Assessor of Newport*, 331 U. S., 486, and is not a denial of due process guaranteed by the 14th Amendment so as to be reviewable by this Court, *Neblett v. Carpenter*, 305 U. S., 297. Where the jurisdiction of a Federal Court is based upon diversity of citizenship, as in the instant case, such Court is, in effect, only another Court of the state, *Angel v. Bullington*, 330 U. S., 183, and it, therefore, follows that the construction of the aforementioned South Carolina Statute by the District Court sitting in South Carolina does not amount to a denial of due process of law so as to be reviewable by this Court.

In accordance with the facts and the law applicable thereto we respectfully submit that the petition for writ of certiorari on the ground that the Circuit Court of Appeals failed to decide a federal question which has not been, and should be, settled by the United States Supreme Court, should be denied.

Point C

The Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The petitioner states that the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings because as stated by petitioner at page 8 of the petition for writ of certiorari "that the Circuit Court of Appeals should have granted full force and effect to said stipulation and should not have endeavored to pass

on the question involved merely from the pleadings and undisclosed statements at the Bar of the Court.

We are at a loss to understand counsel's position on this point. The argument or contention of the petitioner that the Court cannot consider the pleadings and the statements at the Bar of the Court made during oral argument together with the other portions of the record, in order to clarify the stipulation of counsel and determine the question before, is clearly specious. The statements referred to by the Circuit Court of Appeals are statements of counsel for petitioner. A careful perusal of the Circuit Court's opinion will clearly indicate that the Court referred to the pleadings and statements of petitioner's counsel, and for the petitioner to now state that the Court did not refer to the statements of counsel for petitioner is unfair and an attempt to invoke the jurisdiction of this Court without any basis either in law or in fact.

Counsel for petitioner take great comfort in the stipulation referred to in his brief at page 29. May we point out, in order to clarify our position with reference to this stipulation, that the theory of the plaintiff's case was that the defendant was negligent, which negligence on the part of the defendant proximately caused plaintiff's injuries. The case was not tried on the theory that plaintiff was entitled to a recovery merely because contributory recklessness and wantonness on the part of the defendant was not a proper defense. The defendant was not deprived of its right to defend or present any testimony in its behalf with reference to the non-negligence of the defendant or to show non-liability on its part; the only effect of the District Judge's ruling being that the defendant could not defend on the ground of contributory recklessness and wantonness of the plaintiff. It is undisputed that the sole question involved in

the appeal to the Circuit Court was whether or not the Trial Judge was in error in ruling that the defendant was not permitted to interpose the defense of contributory recklessness and wantonness under the construction of Section 7035-17 (Workmen's Compensation Act) of the Code of Laws of South Carolina for 1942.

We are not unmindful of the provision of Section 7035-15, Code of Laws of South Carolina, 1942, which provides that compensation shall not be payable for injury or death if caused by the intoxication of an employee or by the willful intention of the employee to injure or kill himself or another. It is undisputed that counsel for the appellants in their answer did not attempt to set up this defense but simply sought to interpose the defense of contributory recklessness and wantonness as distinguished from willful intentional injury by the employee himself. If the appellant had sought to avail himself of the defense of willful intentional injury on the part of the plaintiff as distinguished from contributory recklessness and wantonness he could have done so in his answer, and obviously this was not done, since such defense was neither set up in the answer nor any point with reference to such defense was made in the instant appeal.

For the reasons aforesaid we respectfully urge that the proceedings before the Circuit Court of Appeals were entirely in accordance with the accepted and usual course of Judicial proceedings and do not warrant an exercise of this Court's power of supervision.

Point D

The Petitioners failed to comply with Paragraph 1 of Rule 12 of the rules of the Supreme Court of the United States in presenting the petition for writ of certiorari, and the petition should, therefore, be denied.

The respondent contends that the appellant has failed to show and prove the basis upon which it is contended that this Court has jurisdiction to review the judgment in question. A careful perusal of the petition clearly fails to include a statementof the grounds upon which it is contended that the questions involved are substantial in accordance with paragraph 1 of Rule 12 of this Court. The case precisely in point is *McArthur v. United States*, 315 U. S., 787.

CONCLUSION

A careful perusal of the petition for writ of certiorari and supporting brief of the petitioner and the transcript of record makes it apparent that the Circuit Court of Appeals did not decide an important question of local law in a way probably in conflict with applicable local decisions; that the contention of the petitioner that this case presents a federal question which has not been decided by the Circuit Court of Appeals is wholly without merit; that the Circuit Court of Appeals acted in accordance with the accepted and usual course of judicial proceedings; and that the petitioner failed to comply with paragraph 1 of Rule 12 of the Rules of this Court in failing to include in its petition the statement of the ground upon which it is contended that the questions involved are substantial. In view of these facts and in accordance with the law applicable thereto and the rules of the United States Supreme Court we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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